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ADSS-0001

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**AMERICAN DISCOUNT SECURITY and
DAUD WARDAK aka DAVID WARDAK**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO)

KEVIN WALKER,

Plaintiff,

v.

CITY OF HAYWARD; OFFICER ART
THOMS, OFFICER SCOTT LUNGER,
and OFFICER ZACHARY HOYER,
individually and in their official
capacities; AMERICAN DISCOUNT
SECURITY; and DAUD WARDAK aka
DAVID WARDAK,

Defendants.

CASE NO. C07-06205 TEH
Assigned to Hon. Thelton E. Henderson

**AMERICAN DISCOUNT
SECURITY AND DAUD
WARDAK'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

Date : March 3, 2008
Time : 10:00 a.m.
Ctrm : 12

I.

INTRODUCTION

Plaintiff's Opposition is misguided. First, contrary to what Plaintiff believes, Defendants are *not* requiring Plaintiff plead specific facts to support his claims. Rather, it is *Plaintiff* who pleaded specific facts in his Complaint which are *inconsistent* with his legal conclusions against Defendant. Again, a plaintiff "is not saved by having pleaded legal conclusions that, if consistent with the facts would establish his right to relief,

1 where the **actual** facts pleaded are inconsistent with those legal conclusions. *See*
 2 *Thomas v. Farley* (7th Cir. 1994) 31 F.3d 557, 558-559. The facts Plaintiff chose to plead
 3 in his Complaint are inconsistent with his legal conclusions and establish that he does
 4 not have a claim against Defendants.

5 II.

6 **DESPITE PLAINTIFF'S LEGAL CONCLUSIONS, THE FACTS PLAINTIFF** 7 **CHOSE TO PLEAD IN HIS COMPLAINT ESTABLISH THAT DEFENDANTS** 8 **DID NOT ACT UNDER COLOR OF LAW**

9 The facts as pled in Plaintiff's Complaint are that his Complaint arises out of a one
 10 time event occurring on or about December 9, 2005. (Complaint, ¶1.) After Plaintiff
 11 was informed that the restaurant was closed, he attempted to inappropriately walk up to
 12 the drive-thru window used for automobiles. (Complaint, ¶21.) Plaintiff then remained
 13 on the Jack in the Box premises despite not having any business to conduct at Jack in the
 14 Box. (Complaint, ¶22.) All of the facts Plaintiff pled in his Complaint about the alleged
 15 attack upon him and his friend specifically identify Officers Thoms and Lunger as the
 16 perpetrators. (Complaint, ¶¶ 22-25.) Notably, the only officer with whom Plaintiff
 17 alleges Wardak had contact with was an Officer J. Snell; Plaintiff does not allege any
 18 wrongful conduct on the part of Officer Snell and in fact has not named Officer Snell as
 19 a defendant in this case. (Complaint, ¶28.) Plaintiff's Complaint only alleges that
 20 Wardak accused Plaintiff of trespass, and that it was Officer Thoms and Lunger who
 21 accused Plaintiff of resisting arrest. (Complaint, ¶¶ 28-29.)

22 In Plaintiff's Opposition, Plaintiff relies upon the theory of joint action to support
 23 his §1983 claim. However, the facts Plaintiff pled in his Complaint are facts which
 24 courts have held do not constitute joint action or *any* action under color of law. The
 25 "joint action inquiry focuses on whether the state has 'so far insinuated itself into a
 26 position of interdependence with [the private entity] that it must be recognized as a joint
 27
 28

1 participant in the challenged activity.” (Citation omitted.) Collins v. Womancare (9th
2 Cir. 1989) 878 F.2d 1145, 1154.

3 For instance, joint action has been found when the case involves more than a
4 single incident of police being called to the scene, but rather the police being present at
5 each step of the plaintiff’s eviction on *multiple occasions*. Collins, supra, 878 F.2d at
6 1154 (*citing* Howerton v. Gabica (1983) 708 F.2d 380)

7 Here, the facts as pled by Plaintiff establish that Wardak merely summoned police
8 on this one occasion. “[M]erely complaining to the police does not convert a private
9 party into a state actor. [Citations omitted.] Nor is execution by a private party of a
10 sworn complaint which forms the basis of an arrest enough to convert the private party’s
11 acts into state action. [Citation omitted.]” Collins, supra, 878 F.2d at 1155.

12 Plaintiff has cited to no case law, which has held that the issue of a §1983 claim
13 may not be properly disposed of by way of a Motion to Dismiss¹, especially when as
14 here, Plaintiff chose to plead specific facts which establish that Defendants did not act
15 under color of law. Notably, the Complaint itself specifically identifies Officers Thoms
16 and Lungert as the only two individuals who committed the wrongful assault and battery
17 upon Plaintiff. The pleaded facts are that Wardak summoned the police to handle a
18 trespassing issue, **not** that Wardak summoned the police to assault and batter Plaintiff.
19 Based upon Plaintiff’s own pleaded facts, Wardak did **not** participate in the prohibited
20 conduct; therefore any conclusory allegation that Wardak wilfully participated in the
21 state action is contradicted by Plaintiff’s own pleaded facts.

22 Accordingly, Plaintiff’s First and Third Causes of Action must fail.

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28 In fact, *see* Allen v. City of Beverly Hills (9th Cir.1990) 911 F.2d 367, wherein the court
dismissed Plaintiff’s 42 U.S.C. §1983 claim by way of a FRCP 12 (b)(6) motion.

III.

**PLAINTIFF INACCURATELY INTERPRETS THE NECESSARY
ELEMENTS FOR MALICIOUS PROSECUTION AND ABUSE OF PROCESS**

Plaintiff does not deny that the Complaint alleges that Wardak made a citizens arrest solely for trespass, and that the criminal prosecution did not involve any charge for trespass. Instead, Plaintiff glosses over these facts, and argues that malicious prosecution and abuse of process causes of action apply to Defendants because the other charges for which Plaintiff was prosecuted occurred as a result of the officers attempt to arrest Plaintiff for the trespass. However, Plaintiff entirely misses the point! Regardless of whether the officers were initially there for a trespass complaint, the decision to charge Plaintiff with *other* crimes was **not** at the request of Wardak, but was rather the independent decisions of the police officers and the District Attorney's office as a result of interactions solely occurring between Plaintiff and the police officers. Defendants had absolutely no involvement in deciding whether Plaintiff was resisting arrest, publicly intoxicated or carrying a dirk or dagger.

The purpose behind causes of action for malicious prosecution and abuse of process is to ensure that people do not use the court system for improper motives or accuse innocent individuals of crimes for which they have been subsequently exonerated. *See Brown v. Kennard* (2001) 94 Cal.App.4th 40, 44; *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150. Here, Defendants cannot be liable for malicious prosecution and abuse of process because the only criminal proceedings instituted against Plaintiff were for alleged crimes which *others* accused Plaintiff of committing. The Complaint is clear that Defendants did not accuse Plaintiff of the criminal charges he was exonerated from, and the criminal proceedings were for crimes of which Defendants had no part in deciding to pursue.

Accordingly, Plaintiff's Fifth and Sixth Causes of Action must fail.

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IV.

PLAINTIFF'S NEGLIGENCE CAUSE OF ACTION
IS BASED ON "DUTIES" DERIVED FROM CAUSES OF ACTION
WHICH DO NOT APPLY TO DEFENDANTS

In Opposition to Defendant's Motion to Dismiss, Plaintiff merely refers to the "list" of duties outlined under his Seventh Cause of Action. A reading of the Complaint's Seventh Cause of Action reveals that Plaintiff is relying on his previous causes of action for alleged statutory violations, as well as his cause of action for malicious prosecution, to establish a "duty". However, based upon the foregoing arguments, Plaintiff does **not** have a claim for the statutory violations, nor for malicious prosecution. Accordingly, the Complaint fails to allege *any* viable duty on the part of ADS and Wardak.

V.

PLAINTIFF DOES NOT HAVE A VIABLE CAUSE OF ACTION FOR
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's conclusory allegation, accusing Defendants of intentional infliction of emotional distress, is also contradicted by the specific facts Plaintiff chose to plead in his Complaint. The Complaint states that Wardak summoned the police and provided a written statement that he was making a citizen's arrest of Plaintiff for trespass. The Complaint acknowledges that the Jack in the Box restaurant was closed for business and that Plaintiff and his friend remained on the premises, despite Wardak informing them the restaurant was closed. (See Complaint ¶¶ 20-22.)

Plaintiff argues in his Opposition that his counsel "was unable to locate any provision in the Penal Code where the crime of general trespass, as loosely described by Defendants in their moving papers, applied to commercial premises." (Plaintiff's Opposition, p. 8:23-25.) However, regardless of whether there is a Penal Code section or not, it is not "outrageous conduct" for a security guard, hired to maintain security of

the premises, to summon police for individuals who remain on the premises after being told that the business is closed.

VI.

PLAINTIFF'S ARGUMENT THAT DEFENDANTS INTERFERED WITH PLAINTIFF'S LEGAL RIGHTS BY MEANS OF VIOLENCE AND INTIMIDATION IS A BLATANT MISSTATEMENT IN LIGHT OF THE SPECIFIC FACTS PLED IN THE COMPLAINT

The Complaint is crystal clear that the only persons to use violence and intimidation against Plaintiff were Officers Thoms and Lunger. Plaintiff does not deny this. Instead, Plaintiff inappropriately attempts to impute the conduct of the officers to Defendants. Plaintiff has cited to no case law that allows a defendant to be liable under Civil Code, Section 52.1 for someone else's conduct. A clear reading of §52.1 establishes that the person who is liable is the person who has actually engaged in the violence, intimidation and coercion. (*See for example*, "If a civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section . . .) Civil Code, Section 52.1(a).

The Complaint merely alleges that Wardak summoned the police. There are no facts that Wardak used any violence against Plaintiff, or ever threatened Plaintiff. Nor are there any facts that Wardak asked the officers to use violence² or threats of violence against Plaintiff.

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Incidentally, Plaintiff's citation to People v. Bamba (1997) 58 Cal.App.4th 1113, 1123 to support his assertion that "violence means the application of physical force" is a blatant misstatement and is misleading. (Plaintiff's Opposition, p. 9:9-10.) Bamba actually states: "In the context of [Penal Code] section 237 [which pertains to felony false imprisonment], 'violence' means 'the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.'" (Citations omitted.) Bamba, *supra*, at 1123. As such, Plaintiff's purported definition of "violence" does **not** apply to Section 52.1.

VII.

PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO AMEND

Leave to amend a complaint is not proper where amendment would be futile and/or the amendment is sought in bad faith. *See Allen, supra*, 911 F.2d at 373. Here, the specific facts pled by Plaintiff establish that Plaintiff does not have a viable claim against Defendants. This is not a case where Plaintiff has merely failed to plead all the necessary requirements for his causes of action. Rather, the facts contained in the complaint *negate* the possibility of any claim against Defendants. The only way Plaintiff could cure such "defect" would be to plead entirely *new facts* to *contradict* the facts he has already pleaded. If Plaintiff amended his complaint to simply *change* the facts to suit his claim against Defendants, irrespective of his belief in their truth, such conduct would be in bad faith.

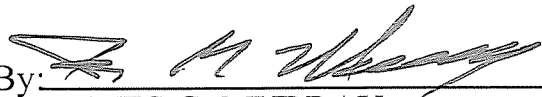
VIII.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this court dismiss Plaintiff's First, Third, Fifth, Sixth, Seventh, Eighth and Ninth Causes of Action against ADS and Wardak without leave to amend.

DATED: February 14, 2008

PRINDLE, DECKER & AMARO LLP

By: 

JAMES G. MURRAY
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AMERICAN DISCOUNT SECURITY and
DAUD WARDAK aka DAVID WARDAK

PROOF OF SERVICE

Kevin Walker v. City of Hayward, et al.
Case No. C07-06205 TEH

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to the within action; my business address is 310 Golden Shore, 4th Floor, Long Beach, California 90802.

On February 14, 2008, I caused the foregoing document to be served, described as **AMERICAN DISCOUNT SECURITY AND DAUD WARDAK'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** on all interested parties to this action, through the use of the website maintained by USDC for electronic service:

SEE ATTACHED SERVICE LIST

☒ **BY E-FILING:** By submitting an electronic version of the document. This case has been ordered for Electronic Case Filing.

☐ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to _____ for delivery to the above address(es).

☐ **BY FAX:** I caused the above-referenced document to be transmitted via facsimile from Fax No. _____ to Fax Numbers listed on service list _____. The facsimile machine I used complies with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(1), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

☐ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the addressee(s).

☐ [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 14, 2008, at Long Beach, California.



ALICE RUSA

Kevin Walker v. City of Hayward, et al.
Case No. C07-06205 TEH

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